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JOSEPH F. SPANIOL, JR.
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No. 85-279

In The
Supreme Court of the United States
October Term, 1985

AMERICAN PETROFINA COMPANY OF TEXAS,
Petitioner,

v.

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION LOCAL NO. 4-23, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION LOCAL NO. 4-23 and LEO MAX HILDABRIDLE IN OPPOSITION

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QUESTIONS PRESENTED

I. Under the Collective Bargaining Agreement signed and effective 12/20/82, was the discharge of Leo Max Hildabridle arbitrable?

II. Under the expired Agreement and pursuant to *Nolde Brothers Incorporated vs. Local 358, Bakery and Confectionary Workers,* 430 U.S. 243 (1977), was the discharge of Leo Max Hildabridle arbitrable under the Agreement which expired 1/08/82?

STATEMENT OF INTERESTED PERSONS

The Respondent, Local 4-23, of the Oil, Chemical & Atomic Workers International Union, is the certified bargaining agent for employees at the American Petrofina Refinery located in Port Arthur, Texas. Leo Max Hildabridle, Jr., had been an employee of that facility and a member of that Labor Organization prior to his discharge. Mr. Hildabridle, the Local Union, and the American Petrofina Company of Texas, together with its parent company, American Petrofina, Incorporated, are the only parties who are known to have an interest in the outcome of this case, aside from their attorneys of record.

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BRIEF IN OPPOSITION TO THE ISSUANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Following contract expiration on January 8, 1982, the Oil, Chemical & Atomic Workers International Union, Local 4-23 ("O.C.A.W." or "Union"), struck the American Petrofina Company of Texas ("the Company"), Port Arthur plant. Picket activity was immediately instituted at the gates of the plant. Respondent Hildabridle honored the picket line and did not report for work on January 8, 1982, nor at any time until the strike concluded. On December 20, 1982, five (5) days following the reaching of a tentative agreement, and on the date that a new contract was signed, the other employees represented by the O.C.A.W., returned to work at the Port Arthur plant. Mr. Hildabridle was not permitted to return to work due to the Company's assertion that he had committed picket-line misconduct on February 20, 1982.

The Company, acting through one of its employees, had instituted criminal charges in Jefferson County, Texas, based on the accusations of picket-line misconduct. (Plaintiff's Exhibits 1, 2 and 3, and testimony of William Crabtree, Trial Record, page 38). Respondent Hildabridle was acquitted of the charges relating to the picket-line activity, by a jury of his peers. (Plaintiff's Exhibit 2). Following the acquittal, all other criminal charges against Mr. Hildabridle relating to any of his strike conduct, were dismissed by the Jefferson County District Attorney's Office. (Plaintiff's Exhibits 1, 2 and 3). Prior to his acquittal, the Com-

pany departed from its custom and practice and sought to discipline Mr. Hildabridle during the term of the economic strike. (Record, pages 12-15). In the past, prior allegations related to strike violence had been dealt with in the back-to-work agreement and had never resulted in employee discipline. (Trial Record, 13-15, and Plaintiff's Exhibit 12). In view of this, the Union sought to negotiate the reinstatement of Max Hildabridle when the tentative agreement was reached on December 15, 1982. (Trial Record 15-17). During the five (5) days that passed between the reaching of the tentative agreement and the signing of the Collective Bargaining Agreement on December 20, 1982, the parties discussed and negotiated the reinstatement of Leo Max Hildabridle and/or the arbitration of his discipline. (Trial Record, 16-19, Exhibit 8-9(d)). The early drafts of the Company's back-to-work agreement would have foreclosed any cause of action in federal court compelling arbitration, as well as waived Mr. Hildabridle's right to arbitrate his discharge or the Company's failure to reinstate him. The final back-to-work agreement, as it was signed, preserved both the Union's right to maintain that either his discharge was arbitrable, or his reinstatement was arbitrable.

When the other economic strikers returned to work on December 20, 1982, the Union filed a grievance concerning the failure to reinstate Mr. Hildabridle. That grievance was accepted by the Company and was processed under an expedited procedure relating to discharge cases. However, following the processing of the grievance, the Company refused to submit the case to arbitration. It was following the Company's refusal to arbitrate the matter of his reinstatement or discharge that the instant ac-

tion was filed in the federal court, seeking an order compelling arbitration under 29 U.S.C. § 185(a).

As was adequately presented by the Petitioner, the district court ruled in favor of the Company, holding that there was no agreement to arbitrate and refusing to require arbitration either on the discharge or on the reinstatement. The United States Court of Appeals for the Fifth Circuit reversed and remanded the district court's ruling. The fifth circuit determined that the discharge of Max Hildabridle became effective on the date of the return to work, and required arbitration under the new agreement. The fifth circuit's opinion permitted the arbitrator to consider the question of arbitrability along with the question of good cause for discharge. The Company sought a rehearing or rehearing en banc, which was denied. (See Appendix, pages A-18 through A-19). Following that, in a timely fashion, the Petition was filed in this Honorable Court.

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REASONS FOR DENYING THE WRIT

Contrary to the assertions of the Petitioner, the fifth circuit's opinion supports a fundamental tenet of federal labor law and policy—the preference for settling of labor disputes by arbitration. Additionally, the Company attempts to convince the Court that the fifth circuit decision in some way conflicts with *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939). As the following argument will demonstrate, no conflict or erosion of the *Fansteel* doctrine exists. The fifth circuit's decision is supported

by the federal labor policy which favors the settlement of disputes by binding arbitration. Since the industrial sanction of discharge remains in effect until such time as an arbitration decision declares that the discharge action was without "just cause," the Company's arguments that employers possess no deterrent action to violence and irresponsible conduct are incorrect. The only action which the fifth circuit's decision encourages is the reference of employee discipline cases concerning economic strike activity to an arbitrator, even though the subject matter of the discipline might have occurred during a period when no contract was in effect. Because of the strong preference for arbitration as a settlement mechanism for labor disputes, the fifth circuit's decision is in harmony with several prior decisions of the Court.

I. National Labor Policy And Prior Decisional Law Supports The Decision Of The Fifth Circuit.

The *Steelworkers* trilogy enmeshed in the fabric of federal labor law the strong preference for requiring industrial disputes to be resolved by arbitration. *United Steelworkers of America v. American Manufacturing Company,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior and Gulf Navigation Company,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel and Car,* 262 U.S. 592 (1960). In *Warrior and Gulf,* federal labor law required lower courts to resolve all doubts in favor of coverage under an arbitration clause. 363 U.S. at 583. Restated, the lower courts were required to issue orders compelling arbitration in most circumstances:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Id., at 582-583. Following the *Steelworkers* Trilogy, the fifth circuit found that the discharge of Max Hildabridle was arbitrable under the new labor agreement and issued an appropriate order. *Oil, Chemical & Atomic Workers International Union Local No. 4-23 v. American Petrofina Company of Texas,* 759 F.2d 512, 517 (5th Cir. 1985). The fifth circuit followed a line of decisions supporting the *Steelworkers* Trilogy: *International Union v. E-Systems, Inc.,* 632 F.2d 487 (5th Cir. 1980), *cert. denied,* 451 U.S. 910 (1981); *Boise Cascade Corporation v. United Steelworkers of America, Local 7001,* 588 F.2d 127 (5th Cir. 1979), *cert. denied,* 444 U.S. 830 (1979). *See also Alabama Power Company v. Local Union 391,* 612 F.3rd 960 (5th Cir. 1980); *International Union of Electrical, Radio and Machine Workers v. Ingram Manufacturing Company,* 715 F.2d 886 (5th Cir. 1983).

As a matter of federal law, the preference for arbitration has formed a decisional basis for requiring successor companies to arbitrate labor disputes. *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543 (1964). Relying upon the strong preference for arbitration as a means of settlement of disputes, this Court has previously held that arbitration may survive contract expiration. *Nolde Brothers, Inc. v. Local 358, Bakery & Confectionery Workers Union,* 430 U.S. 243 (1977). Following federal policy first enunciated by the Congress in the passage of Section 301 and relied upon by this Honorable Court in the *Steel-*

workers Trilogy, *John Wiley and Sons* and *Nolde Brothers,* the fifth circuit's holding in this case should not be disturbed. An obligation to arbitrate was entered into by the parties in the contract that expired on January 8, 1982, and identical contract language renewed all arbitration and grievance provisions in the contract entered into on December 20, 1982. The contract itself failed to exclude the matter of Mr. Hildabridle's discharge or reinstatement. As such, following prior decisional law, the decision of the fifth circuit should not be disturbed.*

II. The Fifth Circuit's Decision Does Not Conflict With The Fansteel Doctrine.

The fifth circuit's decision below is a natural extension of the rule enunciated in *NLRB v. Fansteel Metallurgical Corp.,* 306 U.S. 240 (1939). The Company claims that the fifth circuit's decision in some way erodes the doctrine that an employee guilty of strike misconduct may be discharged without regard to whether or not the employer had also committed unfair labor practices. The *Fansteel* doctrine quite simply arose out of the NLRB's contention that the prior illegal conduct of the employer insulated unfair labor strikers who committed unlawful conduct. The Board maintained that based on the prior illegal conduct of the employer, these unfair labor practice strikers should have been reinstated.

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* In reaching the decision in *Nolde Brothers,* the Court specifically relied upon the parties' failure to exclude from arbitrability contract disputes arising after termination of the contract. *Nolde Brothers,* 430 U.S. at 255. Since the contract itself did not exclude the Hildabridle matter, reference to the arbitrator should be upheld.

In *Fansteel,* ninety-five workers occupied two key buildings of a metal working facility. Following the occupation of the buildings, work stopped and the remainder of the metal working plant ceased operations also. 306 U.S. at 248. Following the occupation of the buildings, a state court issued an injunction requiring those workers to vacate the premises. *Id.* at 249. Following their refusal to do so, contempt proceedings were instituted against the occupying workers and fines and jail sentences were meted out. *Id.* at 249. In that case, the question of the illegality of the conduct had been adjudicated three times by the time the Board's resolution of the conduct was reviewed. The state judge, in deciding to issue the injunction, had considered the illegality of the conduct. Additionally, when contempt proceedings were instituted against the workers, they received an opportunity to defend their actions. Finally, in the Board proceedings, which were subject to judicial review, the question of the individual strikers' guilt or innocence was necessarily considered. Therefore, the persons occupying the premises had three determinations of guilt before their discharges were upheld.

In this case, Max Hildabridle has been exonerated of the criminal charges which form the underlying basis for the Company's decision to discharge him. With respect to whether or not those actions constitute just cause for discharge, there has been no such adjudication. It was upon that very tenet that the fifth circuit's decision was based. The only finding on Mr. Hildabridle's alleged misconduct was an adjudication of innocence on the criminal offense. As such, Mr. Hildabridle is entitled to his industrial day in court.

The Company has argued that the fifth circuit decision takes away the industrial sanction of discharge from an employer. This position is patently untrue. Mr. Hildabridle has not worked at the American Petrofina Refinery since the return to work on December 20, 1982. He will soon have been deprived of his job for a period of three (3) years. What is at stake in this controversy is whether or not the parties are required to go to an independent and impartial arbitrator to determine whether or not his discharge was for just cause. Mr. Hildabridle's right to job security has been protected by that type of discharge provision since he became an employee of the Company. The Company seeks to discharge without any consideration of whether or not their action was proper. In light of Mr. Hildabridle's acquittal, substantial doubt exists as to whether or not the Company's action was justified.

In other labor disputes, under the fifth circuit decision, the employer is not deprived of the right to discharge the worker during the hiatus period. Following the conclusion of the strike, assuming that a prior agreement to arbitrate is renewed and no reinstatement to work is negotiated, the employer is required to submit the merits of the discharge to an arbitrator. Discharge has often been considered to be an extreme industrial penalty and likened to economic capital punishment. F. Elkouri and Elkouri, *How Arbitration Works,* p. 661, n. 60 (4th

Ed. 1985). Provided the employee possesses job security rights in terms of arbitration of discharge for just cause, the employer may impose discipline for strike-related misconduct pending an adjudication that such misconduct occurred.

In that regard, the fifth circuit's decision does nothing to erode the *Fansteel* Doctrine. It is interesting to note that in the *Fansteel* dispute, the workers possessed no arbitration rights, since the entire matter grew out of union recognition and prior to the execution of a collective bargaining agreement. The *Fansteel* Doctrine has the same viability following the fifth circuit's decision in the instant case. That is, a worker may lose his protection under the Act if the worker is found to be guilty of strike-related misconduct. However, the employee loses his protection under the Act only when it is determined that misconduct has occurred.

III. Mr. Hildabridle's Discharge Is Arbitrable Under The Collective Bargaining Agreement Effective 12/20/82

The fifth circuit determined that Mr. Hildabridle's discharge was not effective until the date of the return to work. The opinion states:

> He was not effectively discharged until the Company refused to reinstate him when the new Contract went into effect.

American Petrofina, 759 F.2d at 515. At the very time the discharge was held effective, a Contract requiring arbitration of discharge cases was in effect. Following the *Steelworkers* Trilogy, an agreement to arbitrate existed at

the time the discharge was held to be effective and an Order requiring arbitration must follow. *See American Manufacturing Company*; *Warrior and Gulf; and Enterprise Wheel and Car.*

As an economic striker, Max Hildabridle had certain rights to reinstatement at the conclusion of the strike. In the absence of permanent replacements, an economic striker generally has the right to be reinstated. *NLRB v. International Van Lines,* 409 U.S. 48 (1972); *NLRB v. McKay Radio and Telephone Company,* 304 U.S. 333 (1938). No economic strikers at the Company's Port Arthur Plant were permanently replaced. As such, the Fifth Circuit recognized that Mr. Hildabridle's right of reinstatement was viable and that his discharge was not effective until such time as the Company refused to reinstate him.

Many arbitrators have faced questions regarding discipline of employees duing strikes and during a contract hiatus. *Dan's Market, Incorporated,* 72 L.A. 709 (1979); *Dynamic Manufacturing Company,* 36 L.A. 635 (1960); *Tarcon Incorporated,* 64 L.A. 955 (1975). Reinstatement rights arise from the continued right to job security established over many years of predecessor agreements and the renewal of the contractual relationship between the parties. This right to job security may be said to be independent of the NLRB rights. As one arbitrator phrased it:

> To lose one's rights under the Act is one thing, to lose one's rights under the Labor Agreement is another matter.

Dan's Market, Incorporated, at 709. In the *Dan's Market* case, the arbitrator required reinstatement of strikers aft-

er the Board declined to issue complaints concerning their discharges. It is useful to note that the arbitrator considered the following relevant dates: Company's Discharge Notice, 9/20/77; Back-To-Work Agreement and first return to work, 5/15/79. In ruling in favor of the economic strikers, the arbitrator ordered reinstatement. However, in the remedy phase of his decision, back pay was retroactively ordered only from the date of the return to work. Viewing it from the remedial context, neither the strikers in the *Dan's Market* case nor Max Hildabridle actually had any grievable loss until such time as the return to work became effective. As such, he had a right of reinstatement consistent with, but independent of, his NLRB rights. He had not sustained any grievable loss until the return to work agreement was signed because until such time as the picket line activity had ceased, he would not return to work. Therefore, the court's finding that the effective date of the discharge occurred on the date that the arbitration procedure was renewed is both legally and factually correct. As such, the fifth circuit's decision should not be disturbed.

IV. Mr. Hildabridle's Discharge Is Arbitrable Under The Expired Agreement.

The fifth circuit did not reach the question of arbitrability under the expired agreement. Because the court found the discharge effective on the date of the return to work and recognized the right of reinstatement, it was not necessary to reach the question as to whether the discharge was also arbitrable under the expired agreement. Even the Company concedes that the fifth circuit did not reach the question of whether the discharge was arbitrable under

the expired agreement. (*See* Petition for Writ of Certiorari, page 19). Without belaboring the point, this Court has determined that an agreement to arbitrate may survive contract expiration under certain circumstances. *Nolde Brothers.* In reaching the decision that arbitration survives contract termination, this Court placed great reliance on the national policy favoring arbitration as a means of settlement of industrial disputes. If the subject matter of a particular grievance is arbitrable, then *Nolde Brothers* stands for the proposition that the presumption of arbitrability is not defeated simply because the grievance arises after contract expirations.

The rule enunciated in *Nolde Brothers* has spawned its own progeny. *Hotel and Restaurant Employees v. Williams,* 752 F.2d 1476 (9th Cir. 1985); *Nibbs v. Felix,* 726 F.2d 102 (3rd Cir. 1985); *Glover Bottled Gas Corporation v. Local 282, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 711 F.2d 479 (2nd Cir. 1985); *Ottley v. Sheepheads Nursing Home,* 688 F.2d 883 (2nd Cir. 1982); *Federated Metals Corporation v. United Steelworkers of America,* 648 F.2d 856 (3rd Cir. 1981); *United Steelworkers of America v. Fort Pitt Steel Casting Division-Conval-Penn., Incorporated,* 635 F.2d 1071 (3rd Cir. 1980); *Newspaper Guild of Greater Philadelphia, Local 10 v. Central States Publishing Company,* 451 F.Supp. 1112 (D.C. Pa. 1978); *Washington-Baltimore Newspaper Guild, Local 35 v. The Washington Post Co.,* 442 F.Supp. 1060 (D. D.C. 1977).

Nolde Brothers itself was a benefits case and certain of the decisions cited above also concern employee benefits which the employees argued were due to them after con-

tracts expired. *See, e.g., Fort Pitt and Federated Metals.* A series of contracts in the industrial relations atmosphere gives rise to another form of a continued benefit—the right to job security. It is the pattern of successor contracts that creates and enforces job security among working people who are represented by labor unions. Throughout Mr. Hildabridle's employment, he had a right to be discharged only for just cause, a right which was created in his contract and continued to attach to him whenever he worked, since he never worked without a contract. As such, the Respondents maintain that the benefits cases are entirely analogous to the instant case, since job security is another right created under an expired agreement. In the benefits cases, the employee rights were created under the expired contract, but the incidents which gave rise to the claim for those rights for benefits occurred following the contract expiration. In *Fort Pitt* and *Federated Metals,* no successor agreement was ever reached. In that respect, the continuation of the job security right in this case has even greater force. His right to job security arose under the old contract and was renewed voluntarily by the Company on December 20, 1982.

Four of the cases cited above deal with cases of employee discipline either following expiration of a contract or withdrawal from a multi-employer contract. They are *Glover Bottled Gas*; *Ottley; Washington Post* and *Central States Publishing.* Without exception, each of these cases required arbitration of the out-of-contract discharges. The reasoning relied upon by the various courts differs, but the results are uniform—arbitration is required.

In reviewing the evidence, the contract provisions themselves support continued arbitration. The contract

possesses a broad arbitration provision. (See Plaintiff's Exhibit 4, Article 5). The contract language does not condition the duty to arbitrate upon the life of the contract nor limit the duty to arbitrate upon the expiration of the contract. Additional contractual evidence which supports the determination that arbitration is continuing is the twenty-four month limitation period. In both contracts, the Company and the Union agreed that no issue would be re-arbitrated within a twenty-four month period. Therefore, by implication, the parties intended that the arbitration obligation would continue beyond the life of a particular contract. The no-strike clause is not located in the arbitration article section, so it may be said that the right to strike is not conditioned upon the failure to arbitrate. (See Plaintiff's Exhibits 4 and 7).

Further, the conduct of the parties evidenced an intention to continue to arbitrate. The parties agreed to arbitrate a dispute while no contract was in force. The actual arbitration proceeding was scheduled during the hiatus period. That action though it resulted in settlement rather than arbitration, clearly demonstrates that the parties viewed their arbitration obligations to be continuing. Plaintiff's Exhibit 11 was a list prepared by a Company official of pre-existing disputes that were considered to be arbitrable under the new contract. If the parties did not view their arbitration obligation to be continuing, then either party in the event of a hiatus could claim that pre-existing disputes were no longer arbitrable. Some of the grievances listed in Plaintiff's Exhibit 11 were at least eight (8) years old, dating back to 1978, showing the length of their history as well as the fact of successive carry over. Any conclusion that the conduct of the parties was such

that it defeated the continuing duty to arbitrate would be clearly erroneous.

The contract language, as well as the conduct of the parties themselves, evidenced that the duty to arbitrate was continuing. As such, the matter of Mr. Hildabridle's discharge is also arbitrable under the expired agreement. Such a decision would be entirely consistent with federal labor law and policy as enunciated in *Nolde Brothers.*

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CONCLUSION

The Writ of Certiorari should not be issued in this case. The Petitioner has failed to show any conflict between the decision of the fifth circuit and any decision of this Honorable Court. A closer reading of *Fansteel,* shows that no conflict in fact exists. Furthermore, since the decision of the fifth circuit is supported by numerous prior decisions of this Court, including but not limited to the *Steelworkers* Trilogy; *John Wiley and Sons,* and *Nolde Brothers,* the decision of the Court below should not be disturbed. Alternative grounds exist for the decision rendered by the fifth circuit. Mr. Hildabridle's discharge is in fact arbitrable under the new agreement. Despite the fact that the court did not reach the second issue, it can be concluded that the discharge of Mr. Hildabridle was also arbitrable under the expired agreement. Therefore, no sound reasons exist for the issuance of this Writ of Certiorari.

WHEREFORE, PREMISES CONSIDERED, the Respondents pray that the Court deny the Petition for Certiorari in all things and that the decision of the fifth circuit be permitted to stand, and that this cause proceed to arbitration consistent with the court's Order. Additionally, the Respondents seek whatever further relief, at law or in equity, to which they may show themselves entitled.

Respectfully submitted,

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